A

VINDICATION

OF

The POWER of STATES

TO

Prohibit CLANDESTINE MARRIAGES

Under the Pain of Abſolute Nullity;

Particularly the Marriages of Minors, made without the Conſent of their Parents or Guardians:

In ANSWER to

The Rev. Dr. STEBBING's *Diſſertation on the Power of States to deny Civil Protection to the Marriages of Minors*, etc.

WITH

OCCASIONAL REMARKS

ON

An Enquiry into the Force and Operation of the annulling Clauſes in a late Act for the better preventing of Clandeſtine Marriages, with Reſpect to Conſcience.

In a LETTER to the DOCTOR.

By JAMES TUNSTALL, D. D.
Rector of *Great Charte* in *Kent*.

To come at the Bottom of this Queſtion, we muſt conſider how the Right of Marriage ſtands upon the Foot of the natural Law, antecedently to Society; and then enquire what Alteration the Intervention of Society will make in the Caſe. Enquiry, etc. p. 4.

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A

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OF

The POWER of STATES, *etc.*

SIR,

I TAKE the Liberty to ſend you a few Thoughts, which occurred to me upon reading over your *Diſſertation on the Power of States to deny Civil Protection to the Marriages of Minors, made without the Conſent of their Parents or Guardians**; the profeſſed Deſign of which *Diſſertation* is to ſhew, that the Legiſlature hath exerciſed an unwarrantable Power, a Power to which no Civil Community can be entitled, in enacting, in the late Marriage-Act, *that all ſuch Marriages ſhall be abſolutely null and void to all Intents and Purpoſes whatſoever.*

* *Lond.* 1755.

WHAT I have to ſay upon this Subject may be comprized under theſe two Heads of Inquiry, *viz.*

Firſt, Concerning the Nature and Rights of Marriage; which of thoſe Rights are created by the Law of the Civil State; and what the Power of the State is to annul Marriage.

Secondly, Concerning the Power of the State to annul the Marriages of Minors, made without the Conſent of their Parents or Guardians.

SECT. I.

Concerning the Nature and Rights of Marriage; which of thoſe Rights are created by the Law of the Civil State; and what the Power of the State is to annul Marriage.

MARRIAGE, you ſay*, *has a natural Exiſtence of its own, antecedent to, and abſtracted from all the Laws of Civil Society.—Marriage there was before Civil Societies began; and Marriage there would be again, if all Civil Societies in the World ſhould be deſtroyed.* Here you are undoubtedly ſpeaking

* *Diſſ.* p. 1.

of Marriage, as that Inſtitution either actually *did* ſubſiſt, or, at leaſt, *might have* ſubſiſted upon the Principles of the Law of Nature only. For to no other Species of Marriage can the Characters belong, that, in Force of any univerſal Law *, *it has a natural Exiſtence of its own, antecedent to all the Laws of Civil Society*; and that *it was before Civil Society began.*

BUT when you, immediately afterwards, come to declare the *Rights* or Obligations of Marriage, you then conſider Marriage in a quite different Light; not as this Inſtitution would ſubſiſt upon the Principles of Nature, but as it ſubſiſts upon the Principles of the Chriſtian Revelation, or as it is appointed by the Laws of Civil Societies. *The Rights*, you ſay †, *which* NATURALLY *ariſe from the Marriage-Contract*, are principally theſe, viz. *The Parties contracting are bound to live together in conjugal Love and Fidelity, during their joint Lives; the Wife may challenge Maintenance and Protection from the Huſband; the Iſſue may challenge Maintenance from both,*

* Concerning the State of Primæval Marriage, ſee *Grotius De Jure Belli*, etc. ii. 5. 9. 1, 2, 3, etc.

† *Diſſ.* p. 2.

till they are able to maintain themſelves; and they are entitled to the Subſtance of the Parents, when dead, againſt all Strangers, except ſo far forth as they may ſtand excluded by ſome Act of the Parents themſelves.—Now the firſt of theſe Rights ariſing from the Marriage-Contract, that the *Parties contracting are bound to live together in conjugal Love and Fidelity, during their joint Lives*; is a Right of the Inſtitution of Marriage, not as it ſubſiſts upon the Principles of the natural Law, but as it is improved and enjoined by the Law of the Chriſtian Revelation; the only univerſal Law we know of, whether natural or inſtituted, which hath ſo entirely prohibited Polygamy, and regulated Divorce, as to render the Marriage-Contract an Obligation of the Parties to a mutual and perpetual Fidelity. The ſecond of the Rights above enumerated, the Wife's Claim of *Maintenance and Protection from the Huſband*, beyond the Limits of the natural Marriage hereafter deſcribed, is the Right of Marriage as it is differently ordered or allowed by the Laws of different Civil Societies. The laſt of thoſe Rights, the Claim in the Iſſue of neceſſary Maintenance from their Parents, and the Right to ſucceed to their Subſtance, *except*

ſo

ſo far forth as they may ſtand excluded by the Parents themſelves; theſe Rights, if conſidered abſtractedly from the Appointments of Civil Communities, which differently regulate Succeſſions, in Support of Civil or Legal Marriage, and from other Conſiderations of general Utility; are in Reality Rights not *naturally ariſing from the Marriage-Contract*. They are Rights *naturally ariſing* to the Iſſue from their Parents *as ſuch*, not as they are Parents *joined together in a State of Marriage*. Their Claim of neceſſary Maintenance *ariſes* from the Principle of natural Law, which exacts from Parents the Support of that Being, which they themſelves have given *; and the Claim of Succeſſion *ab inteſtato* to the Remainder of the Parents Subſtance, if it is not intirely the Creation of the Law of the Civil State †, muſt naturally proceed only upon the reaſonable Preſumptions of the Will of the

* Qui dat formam, dat quae ad formam ſunt neceſſaria; dictum eſt Ariſtotelis: quare qui cauſa eſt ut homo exiſtat, is, quantum in ſe eſt, et quantum neceſſe eſt, proſpicere ei debet de his, quae ad vitam humanam, id eſt, naturalem ac ſocialem, nam ad eam natus eſt homo, ſunt neceſſaria. *Grot. De Jur. Belli*, etc. ii. 7. 4. 1, 2.

† See this Point moſt ingeniouſly argued in an excellent Treatiſe, entitled, *Some Conſiderations on the Law of Forfeiture for High-Treaſon*, etc. pp. 11—21. 3d Edit.

Parents

Parents conſidering their ſurviving Repreſentatives as a Sort of Propagation of their own Perſons *. Nature therefore, in the Matter of Succeſſions, diſcerns not the Differences of legitimate and illegitimate, Male and Female Iſſue; as is obſervable in the Uſe of Succeſſions to thoſe Kingdoms, which have been poſſeſſed *in Patrimonio*, where Nature and the Rights of Nature and Nations only could take Place †.

Some of theſe Obſervations may be uſeful hereafter to a more diſtinct Apprehenſion of the Nature and Effects of *a Nullity in Law* of the Marriage-Contract. I am now conſidering, as diſtinctly as may be needful to our preſent Inquiry, the three ſeveral Species, or,

* Hinc fit, ut etiam, citra auxilium legis civilis, prima bonorum ſucceſſio liberis deferatur; quia creduntur parentes illis, *ut corporis ſui partibus*, non tantum de neceſſariis, ſed et de his, quae ad vitam ſuavius honeſtiuſque tranſigendam pertinent, quam uberrime voluiſſe proſpectum, ab eo maxime tempore, quo ipſi rebus ſuis frui non poſſent. *Grot.* ib. ii. 7. 5. 2.

† *Grotius* therefore, ſpeaking of Marriage as an Inſtitution provided to aſcertain the Genuineneſs of the Offſpring, adds—Et, ſi *alio quovis modo* conſtet, quis fuerit pater, aut pater id pro explorato habuerit, *naturaliter* is partus, non minus quam alius quivis ſuccedet. *Ib.* 8. 1. v. et § 12, 16.

I may

I may call them, Degrees of the Marriage-Inſtitution, in Reference to the three ſeveral Laws, which have properly Concern in this Matter; the Law of Nature; the Law of the Chriſtian Revelation, uſually called the Divine Law; and the Law of Civil Society. By the Law of Nature, Marriage is a Contract of Conſociation between the Sexes, extending the Obligation of Fidelity ſo far as is neceſſary to aſcertain the Genuineneſs of the common Offſpring *. Here the Obligation of Fidelity is neither mutual in the Parties †, nor perpetual in either Party. By the Chriſtian Law Marriage, or the Marriage-Contract, is well defined in Biſhop *Fleetwood's* Words; A Contract

* Ratio aliqua reperienda fuit, qua probabiliter conſtaret, quis eſſet partus cujuſque pater. Ea ratio eſt conjugium ſumptum in terminis naturalibus, id eſt, conſociatio, qua femina ſub maris cuſtodia conſtituitur. Ib. ii. 5. 8. 1.

† What is it—which conſtitutes the Marriage-Contract? I anſwer (with *Grotius* and others) it is THAT FAITH by which the Man and Woman *bind themſelves to each other* to live together as Man and Wife. *Enquiry into the Force and Operation of the annulling Clauſes*, etc. p. 5. Now, in one of the two Paſſages referred to, *Grotius* ſays, *Acceſſit* fides, *qua ſe* femina mari *obſtringit*. Ib. ii. 5. 8. 2. In the other, *Conjugium verum eſſe potuit, ſi* femina—fidem marito *dediſſet*. Ib. 15. 2.

or

or *Conſent of a Male and Female to give to each other the Uſe and Dominion of each other's Body, excluſive to all the World beſides, ſo long as they both ſhall live* *. But what is ſubjoined by that great Prelate, that *this is properly the Marriage-Contract, and* COMMON TO ALL NATIONS AND RELIGIONS; is an Error very eaſily conceived from the Attention's being wholly fixed on Chriſtian Ideas, from which you might have abſtracted with leſs Difficulty, when you were profeſſedly conſidering Marriage, as *having a fixed, determinate Nature of its own, which no Laws in the World can alter* †. — It is indeed certain, that the Civil Laws of a *Community of Chriſtians* cannot *alter* this *fixed, determinate Nature* of a *Chriſtian* Marriage-Contract; but yet they *may* and *muſt add* to it, as you both ſuppoſe, ſeveral *Matters of Ceremony, Decency*, and *Prudence*, as *neceſſary* to be obſerved in every Contract of Marriage, *which ſhall be acknowledged, as ſuch, in any particular Civil Community of Chriſtian Men.* In ſuch Caſe Marriage, beſides its natural and Chriſtian, will receive its third

* *Fleetwood Op.* in Fol. pp. 672, 3. as cited *Diſſert.* pp. 41, 2.

† *Diſſ.* p. 41.

Degree

Degree of Exiſtence, its diſtinct *Civil* Exiſtence; when it is ſolemnized under ſuch Qualifications, and according to ſuch a Form, as the public Wiſdom has thought fit to *make eſſential to Marriage in the Community* over which it preſides.

And as there is a certain Order of Aſcent in theſe ſeveral Species, or Degrees of Perfection, in the Marriage-Contract; ſo is there ſuch Agreement and Conſiſtency among them, that a Marriage according to the Chriſtian Law pre-ſuppoſes the Qualifications of the contracting Parties, neceſſary to their marrying according to the Law of Nature; and a Marriage according to the Civil Law of a Community of Chriſtian Men pre-ſuppoſes the Conditions of the contracting Parties, neceſſary to their marrying according to the Law of God. The Qualifications of the contracting Parties, neceſſary to their marrying according to the Law of Nature, are a competent Share of Underſtanding and a Liberty of Will, which are eſſentially required to every moral or obligatory Act whatſoever; and moreover the moral Faculty *, or rightful Power of diſ-

* The Doctor, againſt the Uſe of *Grotius*, whom he tranſlates, and of all the moral Writers, when they ſpeak

poſing themſelves, which is eſſentially required to their contracting the particular Obligation of Marriage. The Conditions of the contracting Parties, neceſſary to their marrying according to the Law of God, are that they be *ſingle* Perſons, and not within the prohibited Degrees; that is, that they retain the moral Faculty of diſpoſing themſelves, which the Divine Law admits; and that they uſe it according to the Rule, which the Divine Law preſcribes.—On the other Hand, it is of great Importance to be obſerved, that, ſhould the Contract of Marriage, which is required by the Law of Nature only, be made by a Chriſtian, without the two Requiſites of Marriage appointed by the Law of God; his Marriage

of *The moral Faculty*, by Way of Eminence, makes *moralis facultas* to ſignify, firſt, what the ſame *Grotius* calls the *vis electrix*, or Faculty of *Choice* which conſtitutes a *free* Agent; and, afterwards, to ſignify the *Maturity of Underſtanding*, which conſtitutes an *intelligent* Agent. *Diſſ.* p. 8, 9, 10. But *moralis facultas* ſignifies *neither*; but *the rightful Power* of doing a moral Action, or of contracting a moral Obligation: whereas the other *Faculties* are no more than a *bare Capacity* of doing theſe Things; and thus the Doctor himſelf obſerves, that *Maturity of Underſtanding conſtitutes the moral Faculty*; *for* WITHOUT THIS *a Perſon* IS CAPABLE *of no moral Obligation*, p. 10.

muſt

muſt needs be *null and void* in Chriſtian Eſtimation, and to all the Purpoſes of Religious Society. In like Manner, ſhould the Contract of Marriage, which is required by the Divine Law only, be made by a Member of a Civil Community of Chriſtian Men, without the Requiſites of Marriage appointed by the Law of that Community; his Marriage muſt needs be *null and void* in Civil Eſtimation, and to all the Purpoſes of Civil Society.

LITTLE more need be ſaid on this Head, ſince, whatever you may judge of the Premiſſes, you have already admitted of, nay, contended for the Concluſion; namely, *the Power of the State* to make Marriages *null in Law*, or to *deny to* them *Civil Protection*. Upon this Principle you could aſſert the Reaſonableneſs and Expediency of the late Marriage-Act, with Regard to the Clauſes annulling Marriages *ſolemnized in illegal Places, and without Banns or Licences* *. Indeed you very commendably prove the Principle, as we ſhall ſee hereafter, from the Neceſſity the State is under of appointing certain Solemnities and Circumſtances *as neceſſary* to a Marriage *good*

* *Diſſ.* Pref. p. ii.

in Law. Taking therefore for granted the Neceſſity, and conſequently the rightful Power of the State to declare what *is* or *ſhall be* Legal Marriage; from what has been laid down, and what is equally admitted by us both, I would briefly account for and juſtify thoſe ſeveral Conſequences, which you have well enumerated, as *neceſſarily following from a Nullity* of Marriage *in Law.* The Conſequences are; *The State will not enforce Cohabitation* of the Parties, *but puniſh it; and the Parties, for ought that the Law will hinder, may marry again;—the Wife can ſue for no Maintenance;—the Law will not oblige the Parents to provide for the Children, any further than is neceſſary to prevent their being chargeable to the Public;—nor ſhall the Children be entitled to any Eſtate as by Inheritance from ſuch Parents* *. Now, in admitting all theſe Conſequences, or Effects of a Marriage declared *null and void in Law*, what *does* the State but what ſhe has *the Power*, or unqueſtionable *Right* to do? Does ſhe take away or deſtroy any Rights belonging to Marriage, as that Inſtitution has *a fixed, determinate Nature of its own; an Exiſtence antecedent to, and abſtracted from*

* *Diſſ.* pp 2, 3.

all

all the Laws of Civil Society? That this is not the Caſe has already appeared. Even the Right of *Inheritance*, or Succeſſion *ab inteſtato* to the Parent's Eſtate, which is either the free Contribution of the Law of the State, or, at leaſt, ſtrictly ſpeaking, is *no natural* Right of Marriage; yet this very Right is ſtill left to proceed upon the probable Conjecture or Preſumption concerning the Parent's Will, which, in the State of Civil Society, where no contrary Signification is given by the Parent, is reaſonably preſumed to have been no other than what the ſtanding Law of the Public has appointed touching Succeſſions *. In the next Place, as the State does not deprive the Marriage, *which is antecedent to Civil Laws*, of any of its inherent Rights; but only confers certain Rights upon the Marriage, to which, on Conſiderations of Policy both neceſſary and juſt, ſhe has

* Illud—tenendum eſt, quoties voluntatis expreſſiora indicia nulla ſunt, credi quemque id de ſua ſucceſſione ſtatuiſſe, quod lex aut mos habet populi, non tantum *ex vi imperii*, ſed *ex conjectura*. *Grot. De Jur. Bell.* &c. ii. 7. 11. 2. A Diſheriſon reaches to the Fruits of the Son's own Labour and Induſtry, which the Iſſue *cannot claim by Inheritance, as by the natural Law they may*. *Diſſ.* p. 31. Now *the Iſſue cannot claim*, by the Force of *the natural Law* itſelf, under the neceſſary *Circumſtances of Civil Society*.

thought

thought fit to give the Sanction of a legal Eſtabliſhment; ſo are the ſeveral Conſequences of a *Nullity in Law* the neceſſary Appendage of the legal Eſtabliſhment of Marriage. Hence the Cohabitation of the Parties, in conſequence of a Marriage diſallowed by the State, may be *puniſhed* as a continued *Diſobedience to the Law* of the State; nor is the State obliged to *enforce* the Divine Law of Marriage, as it is a Contract of mutual and perpetual Fidelity and Aſſiſtance, further than is conducive to her Civil Intereſts, much leſs to her Prejudice*; as neither is ſhe obliged to enforce the natural Law of Parents providing for their Children; *any further* than ſhe has Intereſt in the Preſervation of every Individual, and *any further than is neceſſary to prevent his being chargeable to the Public.*

LET us now ſee whether we can advance ſtill a Step further. I ſaid, you have well maintained the Power of the State to make certain Marriages *null in Law*, or to *deny to* them *Civil Protection*. *Before any Society*,

* So the State denies Civil Protection to Marriages, where either of the Parties ſhall abſent him or herſelf, *without* Notice, for ſeven Years; or, even *with* Notice, ſhall be continually remaining beyond the Seas.

you

you ſay *, *can yield its Protection to a Marriage-Contract, it is neceſſary that the Society ſhould know, that ſuch a Contract is made. And becauſe every Form of Words, which Men may contrive for themſelves, may not have the Force of a Marriage-Contract; therefore every Society has a Right to preſcribe its own Form. It is further neceſſary, that when the Contract is made, it ſhould be notified in ſuch a Manner as the Law ſhall preſcribe; becauſe if every Man was left to his Liberty in theſe Points, and the Society ſhould be obliged to treat all Perſons as married, who ſay or pretend that they are married; the State might yield its Protection to thoſe who cohabit without Marriage; which is by all Means to be avoided in every well-governed Commonwealth*—Now here you aſſert, not only that the Solemnities of making and publiſhing the Marriage-Contract, preſcribed by the Public, are abſolutely neceſſary in order to its being capable of Protection from the State; but that the State acts within her proper and rightful Province; nay, that ſhe is diſcharging an indiſpenſable Duty, both in preſcribing and maintaining thoſe Solemnities; if ſhe would avail herſelf of the

* *Diſſ.* p. 39.

ſalutary

ſalutary Inſtitution of lawful Marriage, and avoid *yielding her Protection to thoſe who cohabit without Marriage; which is by all Means to be avoided in every well-governed Commonwealth:* That is, the State has a Right, and is moreover obliged to *prohibit* unlawful Marriage, which, you ſay, ſhe *cannot* do *by any ſtronger Act than by taking from it all Civil Exiſtence* *; and therefore ſhe has a Right to the *Obedience* of her Subjects, with Regard to the eſtabliſhed Solemnities of Marriage, in Virtue of the Allegiance which they owe to the State, *not only for Wrath, but alſo for Conſcience Sake.* My Inference is, that a *Nullity in Law* of any Marriage-Contract, between Parties in lawful Subjection to the Civil Power, is likewiſe a *Nullity in Conſcience*; or that there is properly NO *Vinculum Matrimonii* ariſing from a Marriage *prohibited* by the State, and declared by her to be *null and void to all Intents and Purpoſes whatſoever.*

A *Nullity in Law* of ſuch Marriage you juſtify as follows, viz. *Every Member of Society muſt be preſumed as having conſented, that unleſs he marries according to the Form, and*

* *Diſſ.* p. 41.

the

the Marriage be publicly notified in the Manner that the Law preſcribes, if he ſhall cohabit with any Woman as his Wife, he renounces his Right to be treated as a married Man.—And the Preſumption is reaſonable. For a Man may reaſonably be preſumed as conſenting to lay himſelf and his Children under any Inconveniences or Incapacities, to tie up his Hands from doing unlawful Things. Upon this Principle all penal Laws are grounded *—But itis not the *Civil Inconvenience or Incapacity*, that is, the *Penalty* annexed, which renders any Law of the State a purely *penal* Law; *i.e.* a Law, which is equally ſatisfied, whether Obedience is paid to it, or the Penalty is undergone. In the Caſe before us, particularly, the Laws appointing, under the Penalty of a Nullity, the neceſſary Regulations of the Marriage-Contract; theſe Laws being enjoyned by the State for the Maintenance of her Virtue, her Peace, her Well-being, that they may attain their full End, the Subject muſt be ſuppoſed to be, in Conſcience and *Juſtice to the State*, obliged to render to them an active Obedience. An Act of Contract in Violation of this neceſſary Duty of Obedience, is itſelf null. For here is no Room

* *Diſſ.* p. 40.

for the Application of the Rule, *Fieri non debuit, factum valet*; which Rule can be juſtly applied to thoſe Acts only, which offend *againſt the Rule of univerſal Juſtice*, or *of human Virtue at large*, not to thoſe Acts which violate the *Dues* of Juſtice *ſtrictly and properly ſo called*, or are *injurious to another's Right*. Thus a Donation, that is prodigal, or againſt the Rules of a juſt Oeconomy, will be valid; not a Donation of what is the Property of another.

To be more particular: There are two Conditions of any moral or obligatory Act, which alike render it invalid, or incapable of exerting its obligatory Force *. The one is, a moral Defect in the *Agent*, or a Want of the *Facultas moralis*, the rightful Power to do the Act, either becauſe it is ſubject to the juſt Authority of another, or becauſe it is otherwiſe injurious to his Right. The other Condition is, a moral Defect, or Viciouſneſs accompanying the *Effect* or Obligation of any moral Act;

* Meminiſſe debemus, non omnia, quæ juri naturæ repugnant, irrita fieri jure naturæ, ut exemplo prodigæ donationis apparet; ſed ea demum, in quibus deeſt principium dans validitatem actui, aut in quibus vitium durat in effectu. *Grot. De Jure B.* ii. 5. 10. 1.

as

as becauſe the Effect of it is Sin, or the Obligation of it is an Obligation to commit Sin or Injury. In the Matter of *univerſal Virtue*, ſuch an Obligation would be an Obligation to commit Sin; which Obligation annuls itſelf. In the Matter of *ſtrict Juſtice* towards Society or Individuals, ſuch an Obligation would be an Obligation to commit *Injury*, or, in your Expreſſion, an Obligation to *do unlawful Things*, which, you ſay, *every Man may reaſonably be preſumed as conſenting to tie up his Hands from.* Now to confine ourſelves to the Caſe before us: An Obligation ariſing from a Marriage-Contract prohibited and alſo diſallowed by the Civil Community, in a Member of that Community, is an Obligation to *do unlawful Things.* It is an Obligation *creating a State* of Diſobedience to the Laws of a juſt Authority, and of an Authority juſtly diſpenſed. Thus is a *Vinculum Matrimonii*, a ſubſiſting Obligation of a Marriage, which is *prohibited* by the *ſtrongeſt Act* of the Law, *null and void* in *Conſcience*; there being a moral Viciouſneſs perpetually accompanying it: And what is ſtill more, there is a moral Viciouſneſs accompanying it, which muſt occaſion interfering and impracticable Obligations. The

Law of the Contract obliges the Parties one way, and the Laws both of God and Man oblige them another *. They *ſtand bound together as Man and Wife before God* †; and yet the State has a *Right* to conſider and to treat them as unmarried. Do not tell me here, that theſe Circumſtances of Perplexity are incident to the common Condition of Life; that the Public, for Inſtance, may be obliged in Conſcience to *eſtabliſh* a Religion, and private Subjects, at the ſame Time, may be obliged in Conſcience to *diſſent* from it; that both the Parties in War may be obliged in Conſcience to proſecute their reſpective Pretenſions, which they think to be juſt. For here Error in Judgments, on one ſide or the other, reconciles all Inconſiſtency. Hence perſonal Obligations may interfere, but Truth and Right never can; contradictory Truths and abſolutely interfering Rights having alike no Place, either in the

* If two Perſons, in contempt of the Laws of Society, whilſt the legal Forms are open to them, ſhall cohabit together as Man and Wife, under a private Contract, it is *an Offence to God*, and one Species of that unlawful Commerce, which the Scripture calls Fornication. *Enquiry into the Force and Operation of the annulling Clauſes, &c.* p. 22.

† Ib. p. 24.

Principles

Principles of the human Mind, or in the Reality of Things.

THE other Condition of any moral or obligatory Act, which renders it ſtill more clearly and unqueſtionably invalid or null, is the moral Defect in the Agent or contracting Party; the Want of a rightful Power adequate to the particular Species of the Act or Contract under Conſideration. If a Subject of Society is deſtitute of the rightful Power of contracting a Marriage diſallowed by the Law; you admit the Conſequence, that there is no Obligation ariſing from ſuch Marriage, either in Law, or in Conſcience; or, in other Words, that ſuch Marriage *is, in Truth,* NO *Marriage,* being *defective* in a Point *eſſential to Marriage,* viz. *A Right to contract it**. Thus *the Right to contract Marriage will be impeded by a prior Marriage ſtill ſubſiſting*; becauſe that *Right* has been paſſed away by each Party to the other, irrevocably, during their joynt Lives. Now as a Party in Marriage paſſes away to the other the natural Right of contracting Marriage *Abſolutely*; ſo may a Member of Society be reaſonably preſumed to have paſſed away to the

* *Diſſ.* p. 3.

Public

Public his natural Right of contracting Marriage *in certain particular Caſes*, and *under certain particular Circumſtances*; in thoſe *particular Caſes*, and under thoſe *particular Circumſtances*, where the Public, in Conſideration of its own important and indiſpenſable Intereſts, finds it neceſſary to *prohibit* and *diſallow* Marriage. We are both, I think, agreed, that every Right of Government, and, I add, Property too, muſt be reſolved into ſome original Conſent or Compoſition, either actual or implied, between the Governing and the Governed, the Proprietor and the Community: And as *nothing ought to be impoſed as a Law, but what may be reſolved into the Conſent of the Subject, either tacit or expreſs* *; ſo the Exerciſe of every natural Right in the Subject is ſuppoſed to have been reſtrained, by the very Contract of Civil Society, ſo far as the public Convenience and Utility, much more ſo far as the public Neceſſities ſhall require. I know not how the Application can be evaded by any one, profeſſing, as you do, the Neceſſity of inſtituting and maintaining legal Marriage to every *well-governed Commonwealth*.

* *Diſſ.* p. 30.

A Limi-

A Limitation then of the natural Power of contracting Marriage, in every Subject of a Civil State, to the *Solemnities* and *Circumſtances* of Marriage, which the Civil State has, upon juſt and cogent Reaſons, thought fit to appoint *as neceſſary*, being implied in the original Contract of Civil Society; it is plain, that the Subject has not the rightful Power of contracting a Marriage declared by the Law to be *abſolutely null and void.* Should he therefore contract Marriage, that is, ſhould he attempt to contract it, in Oppoſition to the Law; no Obligation *of a Marriage-Contract*, no not in Conſcience, can poſſibly ariſe from the Act, which in Reality is NO Marriage. Nor is this to aſſert more, than a Maxim moſt acknowledged in the Caſuiſtical Science, that no ſubſequent Obligation * can take Place in Prejudice of a prior one; or, in other Words, that no Man has a Right over the Property of another. In ſhort, the Subject of Civil Community retains only a *conditionate* Right or Liberty of contracting Mar-

* A prior Contract ſubſiſting with the Society, all ſubſequent Contracts made in Contravention to it, muſt be void. *Enquiry, &c.* p. 11.

riage;

riage; the Right or Liberty of contracting it *in ſome certain Reſpects*, being, by his own Act and Deed, paſſed away to the Public.

A Marriage then between the Subjects of Civil Society, however complete in the Qualifications required by the Law of Nature, but deficient in Qualifications appointed, *as neceſſary*, by the Law of the State; does not carry with it the *Force of a Marriage* in any Reſpect whatſoever. In like Manner, a Vow, however complete in the Qualifications required by the Law of Nature, but deficient in Qualifications appointed, as neceſſary, by the Divine Law, which was the Law of the Jewiſh State; carried with it *no Force of a Vow*, either in Law, or in Conſcience *. If the Huſband

* Numb. xxx. 6, &c.—*I have often heard it ſaid, that a Marriage-Contract, though,—before this Act was made, it would have been Marriage, by the Intervention of this Act will be no Marriage.* Enq. p. 17. In like Manner, it may be ſaid, that a Vow, though, before the giving of this Divine Law, it would have been a Vow, by the Intervention of this Law would be no Vow.—Nor does any Difference in the Caſes ariſe from the peculiar Quality of the latter Law, as it is *Divine*; the ſame Author declaring, that NO LAW IN THE WORLD *can make that which in the Nature of it is a Contract to be no Contract; or that which in the Nature of it is binding not to be binding.* p. 19. So

diſallowed

diſallowed the Vow of his Wife, *on the day that he heard it*; her Vow is declared to have been abſolutely *of none Effect*: And that upon this certain Foundation of natural Right, that the Divine Law, the Civil Law, as I ſaid, of the Jewiſh Nation, which here preſcribes the Bounds of her *domeſtic* Subjection; had *reſtrained* in the Wife her original Power of making a Vow, and left her poſſeſſed only of a *conditionate* Power. I need not, to juſtify the Parallel, ſhew by what Implication of Contract the natural Right of Vowing, in a Subject of the Jewiſh State, might *in Part* paſs away to the Divine Legiſlator or the Jewiſh Republic. But, I doubt not, the ſame Rules and Maxims of

that, according to him, the Divine Law itſelf could not conſtitute any certain *Form* or Solemnities, *as neceſſary* to Marriage. For he ſays, *If you ſay, that a Man has no Right to marry, except he marries in the legal* [Divine] *Form; it will be ſaying* (*in Effect*) *that the Form gives the Right, which is very abſurd. The Form does not give, but ſuppoſes, the Right, and only directs the Uſe of it.* ib. p. 22. N. B. Add, *The Form directs the Uſe of the Right*, UNDER THE PAIN OF A NULLITY, and then there will be nothing *abſurd*; there being no *Abſurdity* in ſuppoſing the *Form* to be as *eſſential* as the *Matter* in the Conſtitution of either a natural or a moral Entity.

moral Interpretation will juſtify the States's Power, *to a certain Extent*, over the Marriages of her Subjects, who will be under an Obligation of Conſcience and Juſtice to Laws fitly ordered for that Purpoſe; theſe Laws directly deriving their Force from the original Law of Nature, which is undoubtedly Divine.

SECT. II.

Concerning the Power of the State to annul the Marriages of Minors, made without the Conſent of their Parents or Guardians.

WE have been hitherto, in great Meaſure, agreed with regard to the Power of the State, to annul the Marriages of thoſe in Subjection to her, made *without her own Conſent*, that is, *prohibited* and *diſallowed by the Law*. Thus, in a certain Reſpect, is every Subject placed under a Sort of tutelar Protection and Reſtraint in the important Concern of Marriage. But the common Authority of the State reſpects the Conditions of Marriage, as they are chiefly directed to her own Peace and Well-being; there is moreover an Authority

more eſpecially diſpenſed, not without a View to the public Good, but directly and chiefly for the Safety and Benefit of thoſe, who are the immediate Objects of it. This is the Conſtitution of a Truſt, preſiding over the Marriages of Minors, and aſſiſted with thoſe Sanctions of Nullity, which the State had found neceſſary to provide in Support of legal Marriage. The execution of this Truſt is, with great Propriety, appointed, in the firſt Place, to reſide in the Father; both as he is *a Parent*, and as he is *the ſuperior* Parent. As he is *a Parent*, the Child is by Nature obliged to a general Honour, Duty and Obedience, endeared by reciprocal Affections, continually enforced by the ſtrongeſt Motives of Gratitude, and particularly grounded on the true Principle of Duty and all ingenuous Obedience, a moral Aſſurance of a judicious and affectionate Conduct for its trueſt Good. As he is *the ſuperior* Parent, he is naturally poſſeſſed, not only of the chief Authority to govern the Family, but of the ſole Power to diſpoſe the Family-Eſtate; which Power of Diſpoſition is the moſt efficacious Means, in the Hands of Civil Government, of enforcing the Neceſſity of legal Mar-

riage*. The Father's Repreſentatives, in the matrimonial Truſt, ſucceed in a juſt Gradation accommodated to the Regards of his Right, to the Claims of Nature, and to the Arbitration of public Equity; but for Defect of ſome one or more of thoſe Foundations of Authority, above recited, *peculiar to the Father*, the Truſt devolves with Abatement of Power, and under a Reſerve of the State's judicial Interpoſition to direct an irregular Adminiſtration to its proper End: A very ſeaſonable Reſtraint upon the unreaſonable and deſigning, but no juſt Diſcouragement to thoſe who are diſpoſed to anſwer the Confidence of their deceaſed Friends with a Care and Fidelity proportioned to ſo ſacred and inviolable a Charge†.

* Why the Father ſhould have the *Right of Conſent* to the Son's Marriage, beſides the Degree of Paternal Authority peculiar to the antient *Roman* State, there was another Principle of the *Roman* Law, or rather of natural Equity, viz. *Ne cui invito ſuus heres agnaſcatur. Inſt.* L. i. Tit. x. Whence it followed, that when the Grand-father adopted any one *Nepotis loco*, if the Son was continuing in the Father's Power, the Son muſt be conſenting to the Adoption; *Ne ei* [Filio] *invito ſuus heres agnaſcatur.* Tit. ſeq. § 7. et *Vin.* in loc.

† That bad Men may find their Account in ſuch a Truſt, is obvious enough; but good ones can get nothing but Ill-will. *Diſſ.* p. 52.

And

And on theſe Terms, and for theſe Reaſons chiefly, has the State thought fit to annul *the Marriages of Minors, made without the Conſent of their Parents or Guardians.*

THUS is the Conſtitution of this Species of Tutelage over Minors, wholly the Effect of the Civil Power; and ſo Tutelage in general has been accounted of in the moſt civilized Nations, being always appointed by their Laws*. What has been ſaid of the Reaſons of committing the Truſt to Parents or their Repreſentatives, tended only to ſhew their *peculiar Qualifications in Nature* for that End, not to aſſert their *Right*. Accordingly there are Inſtances, in the Caſes of thoſe who are of eminent Concernment to the Public, where States exerciſe the Power excluſively of the Parent's Interpoſition. Baron *Puffendorf*, therefore, very juſtly ſays, *What Right thoſe Fathers of Families have in this Matter, who live in Civil Societies, muſt be learnt from the Laws of par-*

* Eſt autem Tutela, ut Servius definivit, vis ac poteſtas in capite libero, ad tuendum eum, qui per ætatem ſeipſum defendere nequit, *jure civili data ac permiſſa. Inſt.* L. i. T. xiii. 1. Et Tutelam et curam placuit *publicum munus eſſe.* T. xxv.

ticular

ticular Commonwealths *. Nor need you be diſturbed with their *different and contradictory Laws*, which, in Matter of *Decency*, *Convenience*, or *Neceſſity*, might well anſwer their reſpective Ends, and all of them conſiſt with the Principles of natural Honeſty. At the ſame Time, the general Agreement of civilized States in appointing the *Subſtance*, however they may differ in the *Circumſtances* of a tutelar Adminiſtration of Marriage, is a very good Argument both of the Reaſonableneſs and Juſtice of the Inſtitution, and its Civil Utility.—I will only obſerve, by Way of Corollory, that we have hence a clear Account, why a Minor's Marriage, which *the Law hath annulled* for Want of the Parent's Conſent, ought not to *be made good by his After-Conſent* †; and, likewiſe, upon what Grounds the Minor's illegal Act ſhould be *treated, as if it were an Offence againſt the State, and not*, as you conſider it, *againſt a private Family only* ‖. The Right of ordering Marriages, as

* *Puffend. De jure Nat.* L. vi. c. 2. § 12. cited *Diſſ.* p. 25.

† *Diſſ.* p. 53.—Conſenſum habeant Parentum,----in tantum, ut juſſus Parentum *præcedere* debeat. *Inſt.* L. 1. T. x.

‖ Ib. p. 54.

the

the Right of Life and Death, is the eſſential Prerogative of the ſupreme Civil Power; but the Adminiſtration of them may be committed in different Degrees and to different Perſons or Orders of the Common-wealth, according to the different Exigencies, or the particular Genius and Conſtitution of each reſpective State: And the Adminiſtration of them both, in the greateſt Plenitude and Extent, was accordingly exerciſed, partly from Commiſſion, partly from Connivance of the State, by Fathers and Maſters over their Families and Dependents in the *Roman* Republic.

It was therefore of ſmall Importance to our preſent Diſpute, to prove ſo elaborately as you do from *Grotius* *, that Parents have not *naturally* the Right of Conſent, neceſſary to the Validity of their Children's Marriage. For though they may not have that Right *by Nature*, yet *Nature does not hinder*, but that it may be derived to them from *the poſitive Will* of thoſe who have the Right; and then it is aſſuredly the Parent's Right by the Force of the natural Law itſelf. For the ſame excel-

* *Diſſ.* pp. 6---15.

lent

lent Perſon, in deſcribing the Law of Nature, very well obſerves, *That the Law of Nature does not only reſpect thoſe Things, which ſubſiſt independently on poſitive Will; but many Things likewiſe, which are the Conſequences or Effects of it. So Property, as it is now in Uſe, was firſt introduced by the poſitive Will of Man; but now it is introduced, it is an Offence againſt the Law of Nature to violate it* *.—He had juſt before ſaid, that *ſome Things are belonging to the Law of Nature; not properly, but, as the Schools ſpeak, reductively; ſuch as bear no Repugnancy to that Law:* Or, in other Words, there is a Law of Nature *Preceptive*, and a Law of Nature *Permiſſive*. Now *that every Perſon that marries, by that very Act ſhuts himſelf out of the Father's Family* †; and, in Conſequence, that the Act of the Son's Marriage is *not under* the Father's *Dominion* ‖; theſe are Principles, not of the Law of Nature Preceptive, but of the Law of Nature Permiſſive; and they are *true* Principles, not abſolutely, but on Suppoſition; or, on Condition of the poſitive Will of thoſe, who have juſt Authority

* *Grot. De Jure Bell.* &c. i. 1. 10. 3, 4.

† *Diſſ.* p. 18.

‖ Ib. p. 8.

in

in the Caſe, not interpoſing to the contrary. The Law of the *Roman* State, therefore, actually *did*, as it very juſtly *might*, interpoſe to hinder the Son's *legal* Independence on his Father's Family till the Act of Emancipation; and, on the ſame Principle, the latter might retain *under his Dominion* the Grand-Child, and, conſequently, the Act of his Marriage, as well as his other legal Acts. For as it is a Principle of the Law of Nature Permiſſive only *, *Qui uxorem ducit, extra familiam abit*; and which will vindicate the Son's Liberty of Marriage in a *State of mere Nature*: So the other Principle, alledged by *Grotius*, to ſhew both the Reaſon and the Limitation of the parental Power, whether in a State of Nature, or of Civil Society, *Æquum eſt, ut pars conveniat cum ratione integri*; this is a Principle of the Law of Nature Preceptive, and of abſolute and immutable Truth. Hence you

* The ſame may be ſaid of the Rule laid down, *Diſſ.* p. 31. *viz.* That *the Father, though he may diſpoſe of his own Eſtate, as he pleaſes, cannot diſpoſe of the Eſtate of his Son, nor ſubject it to Limitations of any kind whatſoever, without the Son's Conſent.*—Ut omnes res liberorum Parentibus adquirantur, non naturale eſt, ſed ex quorundam populorum legibus. *Grot. De jure Bell. &c.* ii. 5. 2. 2.

may obſerve, with what Accuracy *Puffendorf* had aſſerted, that *the Maſter of the Family has naturally no Right to prohibit or reſcind the Marriages of his Children, defective in no other Point than this,* [that they were contracted without his Conſent] PROVIDED THE CHILDREN, SO MARRYING, ARE READY TO GO OUT OF THE FATHER'S FAMILY *. And upon the ſame Principle *Vinnius* argues in Behalf of the Parent's Authority over the moral Acts of his Child, *not of this or that particular Age, but of all Ages without Diſtinction* †.

THE Tutelage of Minors, with reſpect to their Marriage, in the State of Civil Society, appearing thus to be the Effect of the Civil Law; Conſiderations of Nature or Utility, of public or private Policy, are apt to determine different States either to limit or to extend its Duration. According to you, *If the Law ſhould ſay, that no Woman ſhall marry till ſhe is fourteen Years of Age, nor any Man till he is ſixteen, it would be a very ſafe and a rea-*

* *Puffend. De Jur. N.* L. vi. c. 2. § 14. cited *Diſſ.* p. 18.

† *Vinnius* in *Inſt.* L. i. T. x. cited *Diſſ.* p. 24.

ſonable Law *. The Marriages made within theſe Periods reſpectively muſt, conſequently, be *null.* When you farther obſerve, that in fixing the Age of Marriage, *Care ſhould always be taken rather to fall a little below the Standard of Nature, than riſe much above it*; this is very true, in fixing the Age, within which Marriage ſhall be null Abſolutely. But in fixing the Period, within which Marriage ſhall be null when made *without the Conſent of Parents or Guardians*; the general Reaſon of the Minor's Security, and Reaſons peculiar to Families or States, may determine *rather to riſe*, in a greater or leſs Extent, *above the Standard of Nature, than to fall below it.* The Benefit of the Minor, which is chiefly intended in this, as well as every other Species of Tutelage, would naturally extend its Duration to the Period of Ripeneſs of Judgment and deliberate Choice, which is ſufficient for his tranſacting every other important Concern of Life. And if *Experience and Obſervation muſt be conſulted, to know at what Age Perſons ordinarily* arrive at this Period †; I preſume they have been *conſulted* in ſtating the ſame

* *Diſſ.* p. 5. † Ib. p. 4.

Period for the Determination of two Truſts, between which there appears to be a juſt Analogy.

I ſay, there is a juſt Analogy between the two Truſts, the one inſtituted for the Security of the Perſon of the Minor, with Regard to his Marriage; the other inſtituted for the Security of his Civil Intereſts *. They both proceed

* In the *Roman* Law, *Tutela*, which continued till the Minor arrived at the Age of Puberty, was ſupplied by *Curatio* till the Age of twenty-five Years. *Tutor primario* Perſonæ; *ſecundario* Rei: *Curator primario* Rei; *ſecundario* Perſonæ *dabatur*. Now the *tutelar* Truſt of a Minor's Marriage has Reſpect to his *Eſtate*. Thus *Diſſ.* p. 54. in its Addreſs to Minors, ſays, *The Law has ſecured your Eſtates*. And the Perſon inveſted with the Truſt *may be called upon to ſit as Judge to determine the Fate of a whole Family*. p. 51. Hence is ſeen the great Propriety of this Truſt, in order to attain the Ends of a *general Guardianſhip*. But the Author of the *Enquiry* will not allow, *that becauſe the Law may ſettle the Time when a Minor ſhall come to the Uſe of his Eſtate, therefore it may as well ſettle the Time when a Minor ſhall marry. For what*, ſays he, *is it that the Law* ſettles? *Why, not* THE COMMENCEMENT OF THE MINOR'S RIGHT *to the Eſtate,---which ariſes not from the Law, but from the Perſon under whom the Minor claims?* p. 18. Not. But *the Law*, or the Community, does ſuſtain *the Perſon* of the Minor, and conſequently *the Right to his Eſtate*; as it likewiſe ſuſtains for him *the Right of contracting* Marriage; in order to diſpoſe them equally for his Benefit.

upon

upon the common Reaſon of the Imperfection of his Judgement and Experience, and of the Temerity of his Youth. In Remedy of theſe

For *Grotius* well obſerves, *Notandum et hoc, ſi ſolum jus naturale ſpectamus, dominium non dari*, niſi in eo, qui ratione utitur. *Sed jus Gentium ob utilitatem communem introduxit, ut et* infantes *et furioſi dominia accipere et retinere poſſent*, perſonam illorum interim quaſi ſuſtinente humano genere. *De Jur. Belli*, etc. ii. 3. 6. The Doctor indeed may ſeem to think, that the *principal*, or rather *only* Reaſon of the late Conſtitution of a *tutelar* Truſt over the Minor's Marriage, was the Conſideration of his *Eſtate*; ſince *there would*, he ſays, *be no Difficulty in this Matter, if Eſtates were put out of the Queſtion. Diſſ.* p. 50. Yet he ſuggeſts *an Exception againſt the Propriety of a Marriage, which a wiſe and a good Man would lay more Streſs upon, than a Defect in Point of Fortunes; and that is a bad moral Character:* But he doubts *whether a Court of Chancery would attend to ſuch an Exception*, p. 52. Note y. Notwithſtanding that *Exception* may well be implied in the Words of the Act,—*a* PROPER *Marriage*; and notwithſtanding it has been *attended to* in Courts of Juſtice. Diſſentiendi a patre licentia filiae conceditur, ſi *indignum moribus*, vel *turpem* ſponſum ei pater eligat. *Digg.* L. xxvi. T. i. 1. § 1. Laſtly, The Parallel between a tutelar Truſt of Marriage and a general Guardianſhip *may* hold with regard to the frequent Recourſe, which, he predicts, will be had to *Chancery*, on the Occaſion of the former; for the ſame Reſort he has *obſerved of late Years, in the Management of an Eſtate for the Benefit of Minors, and the Care of their Education.* p. 51.

almoſt

almoſt univerſal Infelicities, Society is able to provide another *Help*, beſides *leaving him to himſelf*, or *the ſovereign Diſpoſer of Things* *, who has every where been pleaſed to ſerve the great Uſes of his Providence by the beneficial Contrivances of human Policy. The ſame common Reaſon then, which will ſhew *why the Law may reſtrain a Minor from paſſing away his Eſtate*, will likewiſe *hold to prove, that the State may deny its Protection to his Marriage* †, or *reſtrain* him *from* unadviſedly *paſſing away* his Perſon for Life. And to ſhew, that there is nothing *peculiar* in the Marriage-Contract to deſtroy the Analogy; *Puffendorf* judiciouſly obſerves, that *carnal Knowledge and the Conſent of the Parties cohabiting together, where the Civil Laws diſallow, can no more render a Marriage valid, than a Sale and Delivery made by a Minor, without the Conſent of his Guardian, can paſs away the Title of his Eſtate* ‡.

* *Diſſ.* p. 49. † Ib. p. 29.

‡ *De Jur. Nat.* L. vi. 2. § ult. cited *Diſſ.* p. 28. *The State of Marriage ariſes immediately upon* the Contract, *binding the Conſciences of both Parties*, ESPECIALLY IF CONSUMMATION FOLLOWS. *Enquiry*, etc. p. 6. As if a *Delivery* (analogous to *Conſummation*) could give *Validity* to a Bargain, *null in itſelf* or *annulled by the Law.*

We come to conſider the Extent and Foundation of the *Nullity* of a Minor's Marriage, which Nullity is declared by a ſtanding Law of the State. Firſt, Is it a Nullity *in Law*, or does it extend to *Conſcience?* I anſwer; There is no ſubſiſting *Obligation of Marriage*, ariſing from the Minor's Act, either in *Law*, or in *Conſcience*. This *Puffendorf* himſelf declares in the very Paſſage, which you have recited from him in favour of a different Opinion; where ſpeaking of public Laws, which diſcourage or wholly diſallow ſome particular Species of Marriage; *Which Laws*, ſays he, *may have this Effect, that a Marriage contracted contrary to them, ſhall either be diveſted of certain Civil* Privileges, or *Effects*; *or elſe be intirely reſcinded, i. e.* made *utterly null and void* *. For it has been uſual with States, from Maxims of Civil Policy, to *diſtinguiſh* ſome Kinds of Marriage, or Marriage of certain particular Perſons, with Civil Privileges, which other Marriages were *diveſted of*, though

* Quarum legum ea vis eſſe poteſt, ut quod contra eaſdem contrahitur connubium, certis effectibus, per jus civile aſſignatis, deſtituatur, vel etiam *omnino pro invalido*, et quod *reſciſſionem* admittat, *declaretur*. *De Jur. Nat.* L. vi. c. i. § 8. *Diſſ.* p. 27.

they

they were not ſo much as *diſapproved* by the State*. Other Marriages were diveſted of particular Civil Privileges, which the Law confered on *approved* Marriage, that they might be *diſcouraged*, but by no Means *annulled*. Laſtly, There were Marriages *diſcouraged* and prohibited under *the Pain of a Nullity*. Of the two latter Species, the Baron was here ſpeaking; and had he been confining himſelf to the Conſideration of *Chriſtian* Marriages, I may venture to preſume he might perhaps have *confeſſed, that no Act of Law can deſtroy the* Vinculum Matrimonii, *as it lies in Conſcience*, when it has not *diſſolved* itſelf by the Exiſtence of an Event originally implied in the Contract of *Chriſtian* Marriage; but he would have aſſerted at the ſame Time, that the ſtanding Law of Society can *impede* the *Vinculum Matrimonii* from ever taking Place at all, and conſequently from deriving on the Contractors the leaſt *Obligation of a Marriage*, either *in Law*, or *in Conſcience*.

* Juſtae nuptiae ſervili contubernio opponuntur; non quod non liceat—ſervo ſecum mulierem habere in contubernio; ſed quod nuptiae ſolennes *peculiares quoſdam effectus jure civili effectus habeant*. *Grot. De Jure Belli*, etc. lib. 3. 4. 1.

AGAINST the Nullity *in Law*, in the Caſe of a Minor's Marriage, you argue by demanding; *By what Rule of Conſtruction, i. e.* of the original Contract of Society, *a Preſumption will lie, that the Son, who, in entering into Society, muſt be underſtood as having reſerved to himſelf his natural Right to contract Marriage*, CONSENTS, *that, in caſe he ſhall find it proper to make uſe of this Right, a Diſheriſon ſhall paſs againſt his whole Iſſue, and that himſelf, with the Partner of his Bed, ſhall be expoſed to the Shame and Puniſhment of thoſe, who live together in a State of Fornication* *? What? Muſt then *the Son, in entering into Society, be underſtood as having reſerved to himſelf his* NATURAL *Right to contract Marriage?* What? As having reſerved to himſelf the Right to contract Marriage, *before he is arrived at the Age of ſixteen Years, againſt a reaſonable Law* †? As having reſerved the Right to contract Marriage *ſolemnized in illegal Places?* Marriage *without Banns or Licences?* If the Son muſt be underſtood as having reſerved to himſelf the Right to contract Marriage *under all theſe Circumſtances*, which is undoubtedly his *natural* Right; where then

* *Diſſ.* p. 32. † Ib. p. 5.

is the acknowledged *Wiſdom* and *Juſtice* of Laws annulling *ſuch* Marriage *? Pray, Sir, conſider, that *a Perſon may have Right in himſelf, and yet, in the Uſe of that Right, be under a Variety of Obligations to others* †; of *Obligations of ſtrict Juſtice* to Society, which can *as juſtly*, at leaſt, (for that is ſufficient for our preſent Purpoſe) preſcribe, in certain Caſes and Circumſtances, the *Uſe* and Exerciſe of the Right, as the Poſſeſſor of it can be ſuppoſed to *have* it *in himſelf*.

But, if it was your Intention to demand, Can the Son, who, in entering into Society, muſt be underſtood as having reſerved to himſelf his natural Right to contract Marriage, *ſuch Marriage as ſhall be allowed by the Law of the Community to which he made himſelf ſubject*; be preſumed to have conſented, that, in caſe he ſhould find it proper to contract Marriage, *ſuch as ſtands utterly prohibited and diſallowed by the Law of that Community*, a Diſheriſon ſhall paſs againſt his whole Iſſue, and that himſelf, with the Partner of his Bed, ſhall be expoſed to the Shame and Puniſhment of thoſe, who live together in a State

* *Diſſ. Pref.* p. ii. † *Enquiry, etc.* p. 9.

of

of Fornication? I anſwer directly, that the Son *can* be preſumed, and that he *muſt* be preſumed to have conſented to all this. On the one Hand, the State is certainly inveſted with the Power, received from the Son himſelf, to prohibit certain Marriages under the Pain of a Nullity: On the other Hand, *a Man may reaſonably be preſumed as conſenting to lay himſelf and his Children under any Inconveniences or Incapacities, to tie up his Hands from doing unlawful Things* *? And particularly; *Does not every Man, who unlawfully cohabits with a Woman, baſtardize his Iſſue* †.

LASTLY, Should your Meaning be to aſſert, or rather to aſſume, that *the Son*, in entering into Society, muſt be underſtood as having reſerved to himſelf his natural Right to contract *Marriage without the Conſent of his Parents or Guardians*; then your Argument, completed, as before, in its Form, will be found to depend wholly upon the illegitimate Foundation of a palpable *Petitio Principii*. For would Baron *Puffendorf*, think you, or any one in his right Senſes, who is aſſerting the Power of the State to make the Conſent

* *Diſſ.* p. 40. † Ib. p. 41.

of

of Parents NECESSARY to the Son's Marriage; *ſuppoſe* nevertheleſs, that the Son, in entering into Society, muſt be underſtood as having reſerved to himſelf his natural Right to contract Marriage WITHOUT that Conſent? And yet this very *Suppoſition*, as palpable a *Petitio Principii* as it appears to be, is arbitrarily laid down, and ſeveral Times inſiſted on, as allowed by your Adverſaries. Thus you ſay, *No Man in his right Senſes ever can be preſumed to be conſenting to a Law, to bar his Right to his Eſtate, and to baſtardize his Iſſue*; WHILST THERE IS NO DEFAULT IN ANY MATTER, IN WHICH THE SOCIETY HAS A RIGHT TO REQUIRE HIS OBEDIENCE*. And quickly after, *The Right to marry*, i. e. without the Parent's Conſent, *is out of the Queſtion. This is a Right which the Minor cannot* † *give up.*

* *Diſſ.* p. 35.

† Ib. p. 36. So p. 19. *The Child does but exerciſe its* NATURAL *Right, and he would be an unnatural Father, who, becauſe his Child takes an* HONEST *Liberty, could ſtand by and ſee it* STARVE, i. e. diſinherited.—Where three Things are obſervable. 1. The Parent, neither by the Law of Nature, nor by the Law of Society, can ſtand by and ſee his Child *ſtarve*, i. e. diſinherited as to the *Neceſſaries* of Life; except the Child has committed a Crime *deſerving Death*.

In ſhort, your Adverſaries *muſt* maintain, in Conſiſtency with *their* Principles; and ſo muſt you maintain, in Conſiſtency with *yours*, concerning the Power of Laws to annul Marriages ſolemnized in *illegal Places*, and without *Banns* or *Licences*; that every Perſon, in entering into Society, muſt be underſtood as having reſerved to himſelf *only ſo much* of his natural Right to contract Marriage, as the public Wiſdom, directed by the Maxims of good Government, and in order to obtain the important Ends of Civil Society, has thought it fitting to allow: And therefore in caſe he ſhould find it proper to contract Marriage, contrary to the Obligation of his own Act and Deed, and in Violation of a Right of great Concernment to the Civil Welfare; he muſt,

2. The Child takes a Liberty that is *honeſt*, and exerciſes what is *a Right*, in a State of Nature only, not in a State of Society. 3. The Parent exerciſes a Right, which he hath both by the Law of Nature and by the Law of Society, in diſinheriting a diſobedient Child: Nay, a Right, which the Doctor himſelf, muſt think reaſonable to be exerciſed, if he ſays to Parents with any juſt Meaning; *You are Maſters of the Eſtate and Fortunes of your Families, which will always be a great Check upon your Children, ordinarily ſufficient to keep them back, when they begin to find their Inclinations running contrary to your Judgments.* p. 47.

in like Manner, be underſtood as having conſented, to admit all the Conſequences of a Marriage *null and void* in itſelf; the Civil Inconveniences and Incapacities, upon himſelf, his Iſſue, and the Partner of his Bed, which the Community has an unqueſtionable Right to inflict, and which it has accordingly denounced by a ſtanding Conſtitution, in the neceſſary Support of the legal Inſtitution of Marriage.

A SUBJECT of Civil Community is here underſtood to have conſented to a Limitation of his *natural Liberty of Acting*; but he cannot, in like Manner, be underſtood to have conſented to a Limitation of his *natural and neceſſary Power of Thinking*; in Conformity to the Appointments of public Wiſdom. So that a Man cannot be underſtood as having reſerved to himſelf his natural Right to contract Marriage, *in the ſame unlimited Extent*, as he *may*, and indeed *muſt* be underſtood as having reſerved to himſelf *his natural Right to chuſe his Religion, and to worſhip God according to his own Judgment and Conſcience* *. But to avail yourſelf of a Compariſon between the Caſes of

* *Diſſ.* p. 32.

a publicly

a publicly eſtabliſhed Religion, and a publicly eſtabliſhed Law of Marriage; you muſt ſhew, that the exacted Payment of *Fifty Shillings a-year** is as *proper* a Means of rectifying Error in diſſenting from the eſtabliſhed Worſhip, as *baſtardizing* the Iſſue of an illegal Cohabitation of the Sexes is of correcting Licentiouſneſs: And that *Baniſhment, Confiſcation, or any other Species of Perſecution* of thoſe, *who think it not reaſonable to comply with the Religion of their Country* ‡‡; can either be neceſſary for the Support of the national Religion, or, by Force of any Principle of good Government or natural Juſtice, be inflicted by the State upon thoſe her Subjects, who *could not* but reſerve to themſelves their *natural Right to chuſe their Religion and Worſhip*; and who intitle themſelves to an equitable Share of the common Protection, by the Practice of a religious Worſhip, which is not injurious to the Civil Peace, and by giving to the State all the religious Securities of Civil Obedience †.

* Ib. p. 38. ‡ Ib. p. 32.

† Every Man muſt worſhip God according to his own Judgment and Conſcience. This Principle ſhuts out from Society all oppreſſive Laws, to compel Men to this or that particular Manner of Worſhip; *and no other Principle can.* *Enquiry*, &c. p. 12. Yes, there is *another Principle*,

AND

AND, in general, by ſtating with Moderation and Candour, *what* natural Rights are unalienable, and *cannot* be given up to Society, and *how far* the alienable Right *muſt* be given up to it, in ſupport of its beneficial Eſtabliſhments, whether religious or civil; we may diſcover, what there certainly is, *according to the common Senſe of Mankind*, viz. *the Rule of receding from private Right for the Sake of the public Good*, and its *proper Limitations* *. The Queſtion of public Utility we will leave to be conſidered by *Legiſlators, who ſhould be preſumed beſt to know how far they may go, and when it will be fit to ſtop.* I would only obſerve, that if it be *admitted* to be *for the public Good, that Minors ſhould not be ſuffered to marry without their Parent's Conſent* †; a *ſtanding* Inſtitution of real Utility to the Public bids very fair for not interfering, either

which *ſhuts out all oppreſſive Laws*, viz. the *Inoffenſiveneſs* of the Worſhip different from the eſtabliſhed one, and its Conſiſtency with the Civil Peace and Welfare. And as this Quality of the Worſhip will entitle it to a *Toleration* from the State, ſo a contrary Quality of a Worſhip or Religion, however *according to Mens Judgment and Conſcience*, may as juſtly deſerve to be *reſtrained* from being *injurious* to Society,

* *Diſſ.* p, 38. † *Diſſ.* p. 37.

with the unalienable Rights of Individuals, or with any certain Principles of natural Honeſty. Enough has been ſaid to juſtify the Preſumption of the Minor's conſenting to a Law appointed for his particular Benefit, where, for a momentary Abatement of natural Liberty of little Worth, he receives in Exchange the durable Privilege, either of ſecuring his Perſon, *againſt* his Inclinations, from a raſh Diſpoſition, or elſe of diſpoſing it *agreeably to* * his Inclinations, under the Conduct of a Diſcretion and Affection, which generally both *can* and *will* dictate his true Intereſts, and *will not*, *by the Aid of* a delegated Power, *obſtruct his reaſonable Deſires* †. Nor is it extraordinary in Life, much leſs unſuppoſeable in Law, which generally preſumes People to *have* done what, in Reaſon and from the Nature of the Buſineſs, they *ought* to have done, that a Perſon, under a Conſciouſneſs of his Temerity, Inability, or Liableneſs to be deceived to his Harm, ſhould tie up his Hands *even againſt himſelf*; which has accordingly been done by thoſe, who have

* To Minors, as *they have no Choice left*, my Advice will be ſhort. *Diſſ.* p. 53.

† Ib. p. 47.

been poſſeſſed of Sovereign Rule, even as to the moſt immediate and diſtinguiſhed Acts of their Sovereignty *.

But is not the Right of Marriage *one of thoſe eſſential Points of private Right* †, which *cannot* be given up? Is it not like the unalienable Rights *of Food and Raiment*, which *were given for the* neceſſary *Preſervation of the Individual*, and of which no one *can make a Ceſſion to another, ſo as to bind himſelf to be fed or cloathed as that other pleaſes* ‡‡?—The Right of Marriage *is* an unalienable Right; and therefore it would be both *unjuſt* and *cruel* to make a Law forbiding *all*, or *any* Number of Subjects to marry, who, not having the Gift of Continency, muſt be *forced* to a Condition of Life *unſupportable to human Nature* ‖. Upon this Principle all Vows of Celibacy of an abſolute Meaning and Extent, beſides that they carry the Depravity of a mi-

* Erat Antiochi tertii Regis reſcriptum ad magiſtratus, *ut parerent*, ſi quid Legibus adverſum juſſiſſet; et Conſtantini, ne pupilli aut viduæ cogantur venire judicii cauſa ad Comitatum Imperatoris, *etiamſi Imperatoris reſcriptum proferatur*. Grot. De jure Belli, &c. 1. 3. 18.

† *Diſſ.* p. 39. ‡ *Enquiry, &c.* pp. 11, 2.

‖ *Diſſ.* pp. 43, 4, 5.

ſtaken

ſtaken Piety and the Injury of an Inſtitution unfavourable to the Good of Societies, are in themſelves unlawful and vain. On the very ſame Principle I cannot but diſapprove what you would have enjoyed as *a very ſafe and a reaſonable Law*, viz. that *no Man ſhall marry till he is Sixteen Years of Age* *: Since, as you yourſelf confeſs, in Effect, the Conſequence might be *injurious* and *intolerable* to a *few*. Nor can indeed any ſtanding and perpetual Law, *abſolutely* prohibiting Marriage within a certain Period of Age, be ſo contrived as to be beneficial to the Public, and not at the ſame Time intolerable to many Particulars. This is the very Evil, which the Conſtitution of a tutelar Government over Marriage was provided to redreſs; it being the only Expedient imaginable, whether it is adminiſtred by the Magiſtrate or the Parent, to afford occaſionally an adequate Supply of Reaſon, for the Conduct of a blind and precipitate Paſſion, and to moderate between the Rigour of a Rule eſtabliſhed for the general Benefit, and a miſchievous Deviation from it agreeably to the Bent of particular Inclinations. And muſt not the Uſe and Exerciſe of the moſt inherent and

* Ib. p. 5.

eſſential Rights of Human Nature, of the Rights of *Eating* and *Cloathing*; be ſubject to ſundry Sorts of Regulation? Muſt they not be ſubject to Regulation regarding the natural Good of the Individual, the Regulation of Temperance and Uſefulneſs? Muſt they not be ſubject to Regulation regarding his Eſtate, the Regulation of Oeconomy? Muſt they not be ſubject, in the moſt eſpecial Place, to Regulation regarding Society; that the Manner of Gratification be conſiſtent with Decency, and that the Means of Gratification be not either forbidden by the Law, or injurious to private Property? And what is there abſurd or impracticable in a like Regulation of the Right or natural *Appetite to Marriage?* An Appetite, to which *Nature herſelf will not permit a Child to* liſten *till it hath Underſtanding ſufficient to diſcern between Good and Evil**; and which the innumerable Occaſions and Circumſtances of Mankind, in every ſuppoſeable Condition of Life, muſt require very frequently to ſubmit to Reſolution, or to be ſubdued by Labour, Abſtraction, and reaſonable Self-denial? Is not this Appetite, in a far leſs limited Extent, ſubject to the Diſcipline of perſonal Virtue,

* *Diſſ.* p. 9.

analogous

analogous to Temperance; the Regulation of Chaſtity? Is it not capable of being ſwayed or reſtrained by Conſiderations of Prudence, of private Duty, of public Good; and eſpecially of juſt Authority? If this is not the Caſe, to what Purpoſe do you adviſe Minors *to ſhew Reverence to their Parents, and to the Law*; and NEVER *to ſuffer themſelves to entertain a Thought of diſpoſing themſelves in Marriage, without the Leave of thoſe under whoſe Juriſdiction the Law hath placed them* *.

BUT this *Juriſdiction* may *poſſibly* be abuſed; and a *cautious* and *timorous*, a *cruel* and *unnatural* Parent may obſtruct, not only the *reaſonable*, but the *neceſſary* Deſires of his Child †. This is placing the Argument in its ſtrongeſt Point of View. This, it muſt be owned, is an Inſtance of Extremity, for which the Law *has* not provided: And is it not an inherent Imperfection of all human Laws; is not the Execution of the beſt Laws ſo liable to be perverted by Error, by Paſſion, by Acci-

* *Diſſ.* pp. 53, 4.

† See *Enquiry into the Force*, etc. p. 26. Note. Yet the Doctor declares, that *there would be no Difficulty in this Matter, if Eſtates were put out of the Queſtion. Diſſ.* p. 50.

dent,

dent, that they cannot provide for all the Extremities incident to the human Condition? May not Parties, of whatever Age or Eſtate, be *poſſibly* ſo circumſtanced, as to be rendered incapable of obtaining *legal* Marriage? Marriage in authorized *Places?* Marriage with *Banns* or *Licence? Every Perſon, who is of Age to marry, is of Age to work, and may be compelled to maintain himſelf and Family, ſo far as his own Labour and Induſtry will go. But if this is not ſufficient, he ſtands for the reſt as an Object of the charitable Aſſiſtance of thoſe who abound**. I aſk then; If *thoſe who abound* do ſo far abuſe the Truſt, which Providence has committed to them, as not to afford him and his Family *neceſſary Food and Raiment*; how is the natural Right of *Eating* and *Cloathing* provided for in this Caſe? Caſes are very obvious, in which the Law of Society *can* make *no* Proviſion: The Law of Nature almoſt *always* does. To the real Neceſſities of Nature every thing of poſitive Inſtitution yields. In the certain and imminent Danger of a Community from the Injuſtice of the governing Powers, all Regards of inſtituted Authority ſubmit to the unalienable Right of Self-

* *Enquiry*, etc. p. 9.

De-

Defence. The ſame Right of Nature arms a private Perſon with a temporary Power of judicial Execution againſt an unjuſt Aggreſſor. So does the univerſal Law of Property, ſuppoſed to be introduced by Men conſcious of the Infirmities of human Nature, and ſenſible of the Uncertainties incident to the human Condition, undergo a temporary Suſpenſion in Favour of Indigence, neither relievable by Induſtry, nor relieved by Benevolence. This is a Deciſion undoubtedly true in Theory; but it belongs to Society to judge, whether it ought in Practice to hearken to the Plea of *real* Neceſſity, for Fear of encouraging *falſe* Pretenſions, to the Diſſolution of good Government, and to the Violation of private Right. Civil Judicature therefore ſhall have Cognizance of the *ſanctified* Treſpaſs; and, as the Caſe may require, or the Nature of the Civil Conſtitution direct, relieve by a mitigating Interpoſition of Law, or recommend to the Relief of a benign Prerogative. Exactly parallel is the Caſe of a Marriage-Contract, which an unfeigned Neceſſity entitles to a temporary Exemption from the Civil Law of Marriage: But a Concern of ſuch Importance to Society juſtly claims the Cognizance of the Legiſlative, rather

rather than the Executive, Power; and, after mature Conſideration of what the Extremity of Circumſtance may or might require, and what the Order of Society can admit, Civil Law may ſupply a Redreſs by a timely Interpoſition or by an equitable Retroſpect. In ſuch an Extremity, unredreſſable by a timely Interpoſition; a Caſe barely ſuppoſeable, and in Favour of which a juſt Policy would no more provide an Exception from the general Law of Marriage, than it would provide an Exception in Favour of offending, in like Circumſtances, againſt the univerſal Law of Property: In ſuch an Extremity only, may the Parties in a Contract of Marriage, publicly prohibited and diſallowed, be juſtified in accounting themſelves *Man and Wife before God**; there being, *in this Reſpect*, a temporary Ceſſation of their legal Relation to Society; and there being in themſelves neither real, nor intended Diſobedience to the Law of Society; eſpecially if Society is permitted its eſſential Right of Cognizance in the laſt Reſort. And I will ſtill further add, that in the Caſe of interfering Neceſſities, of public, on the one Hand, and of private, on the other;

* See *Enquiry into the Force*, etc. p. 19.

the

the former *muſt* prevail, no leſs in *Right*, than in *Fact*. For would you, for the *neceſſary* Relief of Hunger, extort from your Father his Morſel, without which he muſt inevitably ſtarve? I anſwer for you; You would *not*. In the Place of your Father put your Country, our common Parent with his Family of Millions!

In ſhort, I obſerve once for all, that the *Right* of Marriage is a *natural* Right, but the Obligation ariſing from a *Contract* of Marriage is a *poſitive* Obligation. Now all poſitive Obligations whatſoever are both ſubſequent and inferior to the Obligation ariſing from the original Contract of Society. For Man is an *Animal*, but a *rational* and a *ſocial* Animal; and as no Demands of the *animal* Nature can be complied with, but thoſe that are agreeable to the Dictates of right Reaſon; ſo the Dictates of right Reaſon, in the firſt and moſt eſpecial Place, oblige us to the Cultivation of orderly Society. On any other moral Foundation it will be impoſſible to reconcile the interfering Conſiderations of perſonal and ſocial Good, and to eſtabliſh an Harmony of the Virtues under the Deſcription of an univerſal Benevolence. On the ſame Foundation public

Neceſſities prevail againſt all private Right; Civil Laws can controul all the poſitive Means of Obligation between Man and Man; and every private Affection is both comprehended under, and to be regulated by, the Love of our Country *.

To apply theſe Obſervations to our further Uſe.—The Obligation of Society being the firſt and the ſovereign of all Obligations ariſing from the Act and Will of Man; the *ſtrongeſt Act* of Society, prohibiting Marriage under the Pain of *abſolute* Nullity, muſt needs, *like a magic Wand* †, *make to vaniſh and diſappear*, or rather, not extinguiſh or deſtroy, as if it was once in Being; but prevent and preclude the very Exiſtence of every Obligation, in *Law* or in *Conſcience*, of the *prohibited* Marriage. For what *magic* Quality is there *peculiar* to the Contract of a Marriage, which ſhould exempt it from the univerſal Law of Contracts, made with ever ſo great Solemnity, and even confirmed by an Oath? *The general Conſtruction* therefore *upon the* late *Act, that if a young*

* Cari ſunt parentes, cari liberi, propinqui, familiares; ſed omnes omnium caritates patria una complexa eſt. *Cic. De Offic.* i. 17.

† *Diſſ.* p. 48.

Gentle

Gentleman ſhould marry a Woman againſt his Father's or Guardian's Conſent, he may marry another without the leaſt Scruple *; as it is a *Conſtruction* agreeable to the *general* Conſent of Mankind, ſo it is warranted by the moſt unconteſted Principles of Juſtice and Government. For has not the *ſtrongeſt Act* of Society fully authoriſed the *Right* of the Parent's or Guardian's *Conſent*, as an *eſſential Ingredient*, or one of the *conſtituent* Properties of the *young Gentleman's* Marriage? It is not *the Conſideration of the Parent's being under Society* ſimply and abſolutely †, but it is *the Conſideration of his* BEING UNDER A SOCIETY, WHICH HAS THUS AUTHORISED HIS RIGHT OF CONSENT, that gives him the *Power* over the Marriage of his Child; whoſe Act of Marriage therefore, being deſtitute of the Property now made *eſſential* by the Law of Society, can neither *exiſt at firſt* under the *Nature* of a Marriage, nor derive a ſubſequent *Obligation of Marriage*, either in *Law*, or in *Conſcience*.

THIS is a *direct* Proof of the Point in Queſtion. You have afforded me another Proof, ariſing *ab abſurdo*. For, you ſay ‡, *If the Law*

* *Diſſ.* p. 48. † Ib. p. 28. ‡ Ib. p. 49.

cannot reach the Vinculum Matrimonii, *as it lies in Conſcience, but only regulates its Civil Effects; it is clear, that the only thing a conſcientious Parent will have to do,* in Caſe of his Child's marrying without his Conſent, *is to get the Couple married in the legal Form as faſt as he can.* You very pertinently here aſk, *But to what Uſe then ſerves the Law?* Allowing your whole Argument, that *it then ſerves to* no *Uſe* at all *; I will make it the Foundation of the Concluſion, that *the Law* certainly muſt *reach the* Vinculum Matrimonii, *as it lies in Conſcience.*

To inſtance in a *Divine* Law. *If a Woman vow a Vow unto the Lord, and bind herſelf by a Bond, being* in her Father's Houſe, in her Youth;—*if her Father diſallow her in the Day that he heareth, not any of her Vows, or of her Bonds—ſhall ſtand* †. Here is a Vow, let the Matter of it be what it will, of religious or ſecular Quality, made, with all proper So-

* Nay, the Doctor goes further. *The Law,* ſays he, *adds nothing but Force; Force is abhorrent to human Nature, and may draw upon you and your Children* Miſchiefs.—*For* Miſchief *there may be, unleſs you could find a Nullity,* etc. *Diſſ.* p. 48.

† *Numb.* xxx. 3, 4, 5.

lemnities, by a Woman placed under two Circumſtances of Incapacity, her *being in her Father's Houſe*, or in a State of Subjection; and her *being in her Youth*, or in a State of Minority. With regard to the former Circumſtance of Incapacity, the Vow, according to *Vinnius's* Deſcription, which is very juſt, is *a Promiſe made to God, in Prejudice of the Parent's Right* *. Now I would aſk you, by the by, whether upon the ſame Principle of domeſtic Government, the Marriage of the Child, without the Parent's Conſent, would not be an Engagement of Contract *made to Man* only *in Prejudice of the Parent's Right*; even *naturally* provided the Child *ſhould chuſe* to continue in his *Father's Houſe*; or *civilly*, provided he continued a *legal* Part of his Father's Family; as obtained by a ſtanding Conſtitution in the *Roman* State. If you anſwer in the Affirmative; is there not the ſame Efficacy of an expreſs Law of the Land to conſtitute the Child, *as to the Concern of his Marriage* †, under a temporary Subjection to his Parent's Power ‡?

* See *Diſſ.* p. 21.

† So there is in the *Roman* Law, *Curatio certae rei.*

‡ Biſhop *Stillingfleet* well obſerves, that *the Scripture only informs us, that Marriage was a divine Inſtitution,*

THE

THE other Circumſtance of Incapacity, mentioned in the Divine Law, is a Woman's *being in her Youth*, or in the State of her Minority; with regard to which Circumſtance eſpecially, I preſume, *Puffendorf* had aſſigned the Reaſon of the Law, which you are willing to admit, viz. *Leſt Women in their* imprudent

and that not merely to continue at Pleaſure, but to be a perpetual Bond of Society between a Man and his Wife; and upon this Principle he *did not ſee how either Church or State can null the Contract, as to Conſcience, ſo as to make it lawful for ſuch Perſons to marry others. Miſcel. Diſc.* p. 72. Afterwards declaring, that *the Child hath* NO POWER *to diſpoſe of himſelf in Marriage before the Age of twenty-one*, according to *the Canons of our Church, without the Parent's Conſent*; and, in Favour of that Conſtitution, alledging the Authority of the Civil Law, the Teſtimonies of Nations not ſubject to the *Roman* Empire, the Opinions of Fathers, and the Practice of the *Greek* and other Chriſtian Churches to this very Day; he concludes with telling us, that, *notwithſtanding all this, the Canoniſts and Caſuiſts, although they do not defend the Lawfulneſs of ſuch Marriages; yet ſay they are not void, nor can be void by the Diſſent of Parents. But there are two particular Reaſons, which moved theſe to reject the Neceſſity of Parent's Conſent*; Firſt, *Allowing them the Power to* ENTER INTO RELIGIOUS VOWS, *without and againſt the Conſent of Parents, to which they found* THIS CASE PARALLEL: Secondly, *Making Matrimony a Sacrament, and ſo bringing it wholly under the Church's Power.* Ib. p. 78. etc.

Years,

Years, *miſled by a Shew of Piety, ſhould undo themſelves by vowing more than their Fortunes would bear*; or, in your Words, *imprudently ruin their Fortunes* *. Now, not to inſiſt again, that the ſame Reaſon will more ſtrongly enforce a Reſtraint over a Minor from *imprudently ruining* both his Happineſs and his *Fortunes* too; I ſay, Did the Divine Law diſcharge the Woman from *the Obligation of her Vow*, as it could lie in *Conſcience*; or it did *not?* If it *did* ſo diſcharge her; the Application is at Hand: If it did *not* diſcharge her, then, I aſk, *To what Uſe ſerved the Vow?* And; Would not *the only Thing a conſcientious Parent* would *have to do* be *to get* the Vow performed *as faſt as poſſible?*

I KNOW, ſome over-ſcrupulous Commentators upon the Text have imagined, that the Woman's Vow would recover its Efficacy of Obligation, at leaſt in Conſcience, upon the Event of her becoming free from her Father's Dominion. But beſides the Reaſon juſt now inſiſted on, that then the Law could *ſerve to no Uſe*; as it is expreſsly ſaid, that *the Lord* would *forgive her* the Performance of her Vow, ſo, if

* *Puffend. De Jur. Nat.* vi. 2. 12. *Diſſ.* pp. 22, 3.

there

there could remain to her any Obligation whatſoever, touching that Concern, it muſt be an Obligation to render ſome religious Service of Charge or Repentance, in Attonement for the Raſhneſs and Indiſcretion, the Undutifulneſs or Irreligion of an incompetent Vow. In like Manner, I by no Means deny, that, though from the *Subſtance* of every Species of Marriage, prohibited under the Pain of abſolute Nullity, there certainly does ariſe *no* Obligation whatſoever, to be fulfilled *according to the Law of Marriage*; yet from the moral Qualifications or Diſpoſitions of the Parties contracting, and from the *Circumſtances* attending the whole Tranſaction of ſuch Contract, there may ariſe ſome ſort of inferior Obligation, to be fulfilled *according to a Law derived from the more diffuſive and univerſal Sources of commutative Juſtice.* Even a Contract of Debt or Alienation, made in Minority or otherwiſe, which the Law does not *prohibit* *, but barely *not aſſiſt*, will

* It is of great Importance, in this whole Diſpute, to attend to the Diſtinction of the Law's *prohibiting* and *annulling*, and of its *barely not aſſiſting* certain Acts of Obligation. *If a Minor makes a Contract to pay a Sum of Money after he comes of Age, the Contract is void in Law. And yet (as the Caſe may be put) Conſcience binds him. So if a Man executes a Bond, defective in ſome eſſential Cir-*

admit

admit, in Conſcience, of a Variety of Modifications, both of a *commercial* and of a *penal*

cumſtance as to Form, the Debt is no Debt in Law: But he is a Knave that does not pay the Money. : It is in this Light that I conſider the [Marriage]Act,*and it can ſtand in no other.* Enquiry, &c. pp. 18, 9. Now the Law does *barely not aſſiſt* the two Species of Obligation abovementioned; but it does not *prohibit* either the *Acts* of contracting theſe Obligations, or the Diſcharge of the Obligations in Conſequence of the Acts of Contract. Hence the Difference is *eſſential* between the Laws reſpecting thoſe Obligations and the Clauſes of the Act annulling *prohibited* Marriage. —On the other Hand, if the Law does *barely prohibit*, but not *annul* any Act or Contract; the Act or Contract may derive an Obligation notwithſtanding the *Prohibition.* Thus, *Our* Engliſh *Laws, before this Statute* [the Marriage-Act] *was made, forbad indeed clandeſtine Marriages, but, when made, admitted their Validity, and allowed the Perſons ſo married the civil Privileges alſo of the married State.* Enquiry into the Force, &c. p. 17. Note. Agreeably to which *Grotius* ſays; Si lex humana conjugia inter certas perſonas contrahi *prohibeat*, non ideo ſequetur *irritum fore* matrimonium, ſi reipſa contrahatur. Sunt enim diverſa, *prohibere*, et *irritum* quid *facere.* De Jur. Bell. ii. 5. 16. 1. The Reaſon is, that the Law, though it did not *approve* theſe Marriages (*conjugia inter certas perſonas*, Marriages, for Inſtance, between Subjects and Foreigners, between Citizens and Slaves) *as the beſt*; yet it *admitted* them as *tolerable.* But there can be no Place for ſuch Conſtruction of Laws prohibiting *certain* Marriages by one of its *ſtrongeſt* Acts, under the Pain of *abſolute Nullity*; and

Quality, arising from the Equality or Inequality of the *Conditions of Contract*, or from the *Circumstances* of Ignorance, Inconsideration and Deception; of Force, Appetite, and Necessity in the contracting Parties. As to a Minor, in particular; as soon as he is advanced to the Age of discerning Good and Evil, he is undoubtedly *capable of moral Obligation**. In the Scale of Obligations there is a new Degree of Ascent, proportionable to every Degree of Increase of his moral Capacities, and to every Accession of Power over his Actions and Things *in commercio*. Though, therefore, he may not be possessed of a Measure of the moral Faculty adequate to the making of a Marriage-Contract, which is by the Act of just Authority subjected to the Will of another; yet he may be possessed of a Measure of it adequate to the Work of another Species of

especially Marriages *greatly prejudicial to Society*, with regard to which there was an allowed *Necessity of reforming our* English *Laws*. Diss. Pref. p. 1. And a Law prohibiting, *under Pain of Nullity*, *Grotius* himself allows to be effectual to *invalidate* a Marriage. Sciendum simul est, non quod vetitum est fieri lege humana, si fiat, irritum quoque esse, *nisi et hoc lex addiderit aut significaverit*. Ib. 14. 4.

* *Diss.* p, 12.

Contract;

Contract; and thence there may be an Obligation *in Conſcience*, to be fulfilled agreeably to the Dictates of the natural Law *Concerning Contracts.* Again, *By our own Laws Minority is no Diſcharge in Caſes of Felony* *; whence 'tis evident, that a Minor may be capable of a *penal* Obligation, which he will be in Conſcience bound to diſcharge to the injured Party, agreeably to the Dictates of the natural Law *concerning Treſpaſs* or *Wrong*. But to ſtate theſe Varieties and Meaſures of Obligation, which Obligation is far from being exempted from the Force of Religion and the Cognizance of Conſcience; but yet, like all other Obligations of a purely civil Quality and Import, may either entirely determine *bonâ gratiâ*, and by mutual Conſent, or elſe be equitably adjuſted in the approved Ways of Compoſition and Satisfaction; would open a wide Field of Debate of little Relation to our Subject. This Subject I have conſidered diſpaſſionately, and without Application to the Paſſions of other Men. I am now, however, obliged to abide the Iſſue of your Appeal † to *the Friends of* public and private *Liberty*, *whether the*

* *Diſſ.* p. 12.

† *Diſſ.* p. 46.

annulling Clauſe, as to Minors, will not well *ſtand with the Principles* of both; of public Liberty, which cannot ſubſiſt but in Conſiſtency with good Government; and of private Liberty, the only valuable Branch of which is, to act in Conformity to a reaſonable Law, in all human Probability, the moſt efficacious to the true Intereſts of the Perſons particularly concerned. Every other Species of Liberty is either a Liberty of Indifference to their Happineſs, or elſe a Liberty of creating Miſchief and Miſery to themſelves. It might be wiſhed, you had entered more deeply into the Syſtem of Liberty, which poſſibly might have ended in quieting your Scruples upon that Head; and then you had, happily for the Public, *prefered the annulling Clauſe to any other Method, as it would*, in your Opinion, *have anſwered the full End and Purpoſe of them all* *.

I am, Sir,

Your obedient humble Servant,

JAMES TUNSTALL

* *Diſſ.* p. 46.